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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

DONALD SPARKS,
Petitioner

vs.

ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, DONALD SPARKS, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 15th of September, 1970, which judgment affirmed the conviction of DONALD SPARKS for the crime of robbery in the Circuit Court of DeKalb County, Alabama.

A timely application for rehearing in the Court of Criminal Appeals of Alabama was denied, without opinion, on the 17th of November, 1970.

A timely application for a writ of certiorari was filed in the Supreme Court of Alabama and denied, without opinion, on the 17th of December, 1970.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Alabama has been reported at 242 So2d 403, *cert. den.* 242 So2d 408, and is attached hereto in Appendix A, *infra*, pp. A1 thru A7.

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 15th of September, 1970, and is

annexed hereto in Appendix A, *infra*, p. A8.

A timely petition for rehearing was denied on the 17th of November, 1970, and the judgment of the Court of Criminal Appeals of Alabama thereon is in Appendix A, *infra*, p. A9.

A petition for writ of certiorari timely filed in the Supreme Court of Alabama was denied on the 17th day of December, 1970, and the order thereon is in Appendix A, *infra*, p. A10.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered the 15th of September, 1970, is 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether or not Alabama denied to petitioner SPARKS the right to compulsory process for compelling the attendance of two witnesses subpoenaed by him, such right being guaranteed by the Sixth Amendment, United States Constitution, as the same is made applicable to Alabama by operation of the Fourteenth Amendment, United States Constitution, where Alabama made little or no showing that a diligent effort, or any effort, was made by the Sheriff's department, DeKalb County, Alabama, to serve the requested subpoenas upon these witnesses.

II.

A subsidiary, and necessarily included question, is whether or not Alabama denied petitioner SPARKS Fourteenth Amendment, United States Constitution, due process by the refusal of a requested continuance predicated upon the absence of these two witnesses.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

I.

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the

right *** to have compulsory process for obtaining witnesses in his favor,***

II.

Constitution of the United States, Amendment XIV, Section 1:

Section 1. ***nor shall any state deprive any person of life, liberty, or property, without due process of law;***

III.

Title 28, Section 1257(3), United States Code:

Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, ***where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, ***the United States.

STATEMENT OF THE CASE

Petitioner SPARKS was proceeded against in the Circuit Court of DeKalb County, Alabama, for the criminal offense of robbery, such robbery having occurred allegedly on the 27th of June, 1966.

The salient and pertinent facts to support the indictment produced on the trial of this cause from the 28th of August, 1968, through the 31st of August, 1968, are delineated in the opinion of the Court of Criminal Appeals of Alabama, and, in the interest of conserving time and space, shall not be repeated at this point. The attention of the Court is respectfully invited to Appendix A, *infra,* pp. A1 thru A3 , since this opinion fairly presents the basic factors involved in the trial.

Of particular import here, however, and especially in connection with the questions for which review is sought, the proceedings concerning the missing two witnesses must be presented at greater length.

Prior to the commencement of the presentation of the evidence on the case in chief for Alabama, but after the selection of the jury, petitioner moved for a continuance because of the absence of two witnesses: William K. Knight and

Ida Bell Wilson Stacey. Evidence was adduced in support of this motion.

Sheriff Harold Richards, of DeKalb County, testified, on examination by Alabama, that he made an effort to locate William K. Knight; that he did not find him; that he heard that he was in Florida; that he was not around Ft. Payne, DeKalb County, Alabama, that he knew of.

On cross-examination, Sheriff Richards stated there was no address for Knight; he was then shown a certified copy of an application for an automobile tag which listed an address for Knight as 1909 South Gault Avenue, Ft. Payne, Alabama; Sheriff Richards did not go to that address; G. H. Noles lived there at the time the tag was bought; Richards did not go to that address to see if Knight was there so he could be served.

The tag application was introduced into evidence in support of the motion of SPARKS for a continuance.

Curtis Davis, clerk of the police force of Ft. Payne, Alabama, was called as a witness for SPARKS. Davis stated he had a record of one Tom Walston being arrested for driving while intoxicated on the 17th of May, 1968, at 11:48 o'clock, P.M. He was released, leaving an automobile as bond collateral. Later, Walston picked up the car; no other collateral was left; the bond was forfeited on the 28th of May, 1968.

Sheriff Richards was recalled and testified that he saw Walston after he was brought in on this occasion. Ida Bell Wilson Stacey was with Walston; this was probably in July when Walston signed a waiver of extradition; apparently there had been a request that Ida Bell Wilson Stacey be placed under bond in this case; the Sheriff knew nothing about this hearing on the 20th of May, 1968; the Sheriff saw Walston in July, 1968, and Ida Bell Wilson Stacey was with him.

Davis Keen, a police sergeant of Ft. Payne, Alabama, stated he arrested Walston on the 17th of May, 1968, and Ida Bell Wilson Stacey was with him.

Carrel Ivey, Clerk, Circuit Court, DeKalb County, Alabama, was recalled as a witness and testified he did not recall when the subpoena for Ida Bell Wilson Stacey was requested, but it was issued on the 17th of May, 1968; the subpoena for the present term of court was issued on the 6th of August, 1968; the term of court for the criminal docket of

DeKalb County was set on or about the 6th of August, 1968; a subpoena for Ida Bell Wilson Stacey was issued on the 26th of July, 1968, and that was the approximate date court was set, *i.e.*, when it became known that a term of court would be held in August, 1968, for the criminal docket.

Evelyn Keith, a sister of Ida Bell Wilson Stacey, stated she last saw her sister about three weeks before when Ida Bell came to her house on the top of Lookout Mountain; this was some time after the first of August, 1968; she was with Tom Walston, and stayed about an hour; she had seen Ida Bell several times prior to this, about 3 or 4 times between the 17th of May, 1968, and the 1st of August, 1968; she was in DeKalb County; Ida Bell left her house about 3 weeks previous, presumably going to Florida.

Counsel for SPARKS then stated to the trial court:

> "MR. BEATY: ***We ask for a continuance due to the fact that we don't have these witnesses here, William K. Knight, who was involved in the robbery here, and Mrs. Wilson, who has been acknowledged by the prosecuting witness to have been in the house at the time the robbery occurred. She has been here in the jurisdiction of the Court after our subpoena was requested and after it was issued by the Clerk."
>
> "THE COURT: I overrule your motion."
>
> "MR. BEATY: We except."

Subsequently during the progress of the trial, petitioner SPARKS attempted to introduce into evidence a tape recording of a statement by Ida Bell Wilson Stacey, to which Alabama objected on the ground, among others, that it was not shown that a deposition of the witness could not have been taken.

Petitioner SPARKS answered the objection on the grounds, among others, that:

> "***On the day of the mistrial on account of the illness of a juror the defendant immediately requested the Court, and the request was granted, to get a subpoena for the next term of Court, and requested the Court to put the witness under bond, and since that time this same witness has been back in Fort Payne since the May term of Court, and the subpoena has not one time been served on her. *We*

> *say that we have been denied due process of law in subpoenaing our witness.* Another subpoena was issued on the 26th of July and since that time this witness has been home and that she has been seen here four times." *(Emphasis supplied).*

The trial court sustained the objection of Alabama to the introduction into evidence of the tape recording. An exception was duly taken.

Then exhibits were offered for petitioner SPARKS as showings for William K. Knight and Ida Bell Wilson Stacey, to which objections were sustained.

The showing for William K. Knight, an avowed participant in the alleged robbery, exculpated petitioner SPARKS.

The showing for Ida Bell Wilson Stacey did likewise.

The Court of Criminal Appeals of Alabama correctly noted in its opinion that petitioner SPARKS argued the constitutional issue involving compulsory process for the attendance of witnesses in brief, and, it might be noted, this was a federal constitutional argument.

The Court of Criminal Appeals, of course, decided this issue. Hence, it is submitted the federal constitutional question was raised at the first opportunity in the trial court; the issue was briefed on appeal; and the matter was adjudicated adversely to the petitioner SPARKS on federal constitutional grounds.

There is a properly presented federal constitutional issue before this Court.

REASONS FOR GRANTING THE WRIT

The right of a defendant in a criminal case under the Sixth Amendment to have compulsory process for obtaining witnesses in his favor is made applicable to the States through the Fourteenth Amendment, since the right is so fundamental and essential to a fair trial. *Washington v. Texas,* 388 US 14 (1967).

Since this pronouncement by this Court there has not been a decision which has delineated the duties and responsibilities of a State in affording to a criminal defendant the implementation of this Sixth Amendment right.

Many States, but not Alabama, have approached the problem of witnesses outside the jurisdiction through enactment of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See, *e.g., Oregon v. Blount,* 200 Or 35, 264 P2d 419, 44 ALR2d 711 (1953), wherein such a statute was construed as not permitting a court to order payment by the state of mileage and other fees.

The case on the question that still is the law apparently is *Minder v. Georgia,* 183 US 559 (1902). In *Minder* there was a refusal to continue because of out-of-state witnesses. This Court *held* there was not a denial of due process because it was not within the power of a state court to compel the attendance of witnesses beyond the limits of the state. This Court further stated that due process was not denied because there was no provision in state law for out-of-state depositions.

As mentioned in the opinion of the Court of Criminal Appeals, Alabama does have a statute which permits a defendant in a criminal case to take a deposition of a witness who is out-of-state.

Also, attachment of a recalcitrant witness is mentioned by the Court of Criminal Appeals. But a close reading of the opinion indicates this comes into operation only when the witness has actually been served with a subpoena requiring his attendance upon the trial court.

Petitioner SPARKS is also aware of *Lisenba v. California,* 319 US 219 (1941), wherein this Court ruled that a continuance was not required to meet Fourteenth Amendment due process requirements merely to answer the contentions of the prosecution, and that this Court would not inquire into whether the California court abused its discretion in so denying a continuance.

Notwithstanding such holdings, particularly since the judicial gloss on the Sixth Amendment was not read into the Fourteenth Amendment due process clause under which *Lisenba and Minder* were decided, petitioner SPARKS would remark that the primary thrust of his petition, as noted, concerns the duties and responsibilities of Alabama in affording him compulsory process.

SPARKS submits that constitutionally when a subpoena has been requested, as it was in this case, then a State must exert more than a minimum of effort to serve that subpoena upon the witness. Furthermore, it is the position of SPARKS

that once the question has been raised about service of the subpoena that it becomes incumbent upon a State to demonstrate it has actually made a serious attempt to effectuate service.

The record is clear that subpoenas were requested and, in fact, issued in this case. Apparently, no effort was made to serve the two witnesses at available addresses. The Sheriff had merely heard they were out of the state, or not otherwise amenable to service of process. Petitioner SPARKS had sought bond for the witness Ida Bell Wilson Stacey. SPARKS did everything available to him to secure the presence of these witnesses.

It is submitted Alabama failed in its duty to furnish compulsory process! Petitioner further submits Alabama did not make a sufficient showing as to why the subpoenas were not served.

In this posture of the matter, then SPARKS cannot be faulted for not utilizing statutory out-of-state deposition procedures. An adequate showing by name of what such witnesses would testify to was offered, but refused. Compare *Lisenba, supra.* This testimony, if believed by the jury, would have been more than adequate for an acquittal since the showing caterogically denied that SPARKS was a participant in the robbery alleged in the indictment.

CONCLUSION

The questions presented are deemed to be ones which have not been considered by this Court, particularly in the light of *Washington v. Texas, supra.*

Petitioner SPARKS submits because the questions do involve highly important facets of Sixth Amendment interpretation this Court should issue the writ of certiorari so that these questions may be fully briefed, argued, and decided.

Respectfully submitted,

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March, 1971

Counsel for Petitioner

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1969-70

7 Div. 9

Donald Sparks

v.

State

Appeal from DeKalb Circuit Court

PRICE, PRESIDING JUDGE

Appellant, Donald Sparks, stands convicted for the offense of robbery, with a penitentiary sentence of ten years.

The evidence tends to show that three armed men, with scarves covering their faces, entered the home of Wendell West, in Fort Payne, Alabama, around eleven o'clock p.m., June 27, 1966. They handcuffed and bound Mrs. Cleo West and Mrs. Wilson, a woman companion, and removed the keys to Mrs. West's Dodge Dart automobile from her purse. When Mr. West came home about one o'clock two men, each holding a gun to his head, took $334.00 from his pocket. Mr. West was then taken into the bathroom and immersed in a bathtub full of water in an effort to force him to reveal the whereabouts of his money. During the scuffle in the bathroom defendant's scarf dropped and Mr. West saw defendant's face. Mr. West was taken into the room where his wife and Mrs. Wilson were. He was handcuffed and his eyes were taped. Defendant took the keys to Mr. West's office and left with one of the men, later identified as William K. Knight. The third man remained at the house for about an hour and a half, until someone came and called to him and he left.

Officers Kean and Shirley, Fort Payne policemen, stopped the West's Dodge Dart on a Fort Payne street during the early

morning hours of June 28th. Defendant was driving the car. Knight was riding as a passenger. Neither of them could produce identification or driver's license. There were two pistols and a carbine in the car. Three cars were driven to the police station. Officers Kean and Shirley in the lead car and Sergeant Pack, a Fort Payne policeman in the police car behind the Dodge Dart driven by the defendant. Upon reaching the police station, the defendant got out and walked over to the side of Sergeant Pack's car and talked with him through the window. Defendant then ran back to the West car and drove away. The car was found abandoned some two or three hours later.

Sergeant Pack was also indicted for the robbery of Wendell West. He testified he had never seen defendant prior to the trial. He testified Mr. Clyde Traylor, representing the State, had promised him a "clean bill of health" if he would identify the defendant, Donald Sparks, as the driver of the West automobile.

Donald Sparks testified as a witness in his own behalf that he was not in Fort Payne on the evening of June 27, 1966, or the early morning of June 28; that he was in Sapulpa, Oklahoma; that he had never entered the West home or driven the Dodge Dart.

The defendant sought to establish an alibi through the testimony of Mr. Jesse Henson, owner and manager of a motel in Sapulpa, who testified Donald Sparks was registered in his motel from June 26 to June 29, 1966. He identified defendant as the person who registered and that he was present on each of the three nights.

Mr. Clyde Traylor, for the State in rebuttal, stated he had never made a promise to Sergeant Pack pertaining to Pack's identification of defendant.

The testimony presented questions for the jury's determination and was sufficient to sustain the verdict. There was no error in the court's refusal of the requested general affirmative charge nor in the denial of the motion for a new trial.

Counsel for appellant filed motion to quash the indictment on the ground there was no legal evidence before the grand jury to authorize the finding of an indictment.

The burden of proving the indictment was returned without legal evidence before the grand jury rested upon defendant. *Gore v. State*, 22 Ala. App. 136, 114 So. 791; *Sparrenberger v. State*, 53 Ala. 481; *Franklin v. State*, 233 Ala. 203, 171 So. 245.

No proof was presented to support the allegation that there was no legal evidence before the grand jury. The defendant failed to meet the burden placed upon him. The motion to quash was properly denied.

The defendant filed motion to require the state to produce testimony presented to the grand jury which returned the indictment. The motion was overruled. The judgment entry recites that the testimony taken on this motion shows conclusively that the testimony before the grand jury was not preserved in writing. *Adams v. State*, 33 Ala. App. 136, 31 So. 2d 99, holds that if the state uses part of the transcribed notes of the testimony before the grand jury, the defendant is entitled to inspect all of such testimony.

In *Bailey v. State*, 24 Ala. App. 339, 135 So. 407, the court said the trial judge will not be put in error for refusing to order production of grand jury notes where they were used by the prosecutor merely to formulate questions and were not offered in evidence by the state. See also the article by Hon. L. Drew Redden, published in 22 Alabama Lawyer at p. 115 (April, 1961).

Without deciding that a defendant is entitled to be furnished with the testimony taken before the grand jury, (See *Sanders v. State*, 278 Ala. 453, 179 So. 2d 35) we simply hold that in this case the motion was properly denied, since the judgment entry shows the testimony before the grand jury was not available.

Appellant contends the trial court erred in putting him to trial over objection when three jurors, properly summoned, failed to appear.

The judgment entry shows that the jury list served upon the defendant from which to select a jury consisted of eighty jurors regularly drawn for jury duty and twenty special jurors properly drawn, consisting of venire of one hundred jurors. A hearing was had on the motion. The sheriff testified he was unable to locate one of the jurors inquired about. The trial judge stated he had not excused either of the three jurors. There was

no error in the court's ruling. *Nolen v. State*, 35 Ala. App. 249, 45 So. 2d 786; Title 30, §§ 63 and 67, Code of Alabama 1940.

The clerk entered opposite each name on the jury list the occupation and place of residence of such person. The provisions of Title 30, § 30, Code, supra, as to the listing the place of business of each person are directory only, and the failure to list the place of business is not a ground for granting a motion to quash the venire, § 45, Title 30, Code, supra; *Childers v. State*, 122 Ala. 22, 26 So. 162; *White v. State*, 136 Ala. 58, 34 So. 177. There was no showing of fraud. *Cook v. State*, 134 Ala. 137, 32 So. 696; *White v. State*, supra.

Defendant's motion for a continuance because of the absence of the witnesses William K. Knight, alleged to have been a participant in the robbery, and Ida Bell Wilson, the woman who was with Mrs. West at the time of the robbery, was denied.

The motion for a continuance was addressed to the sound discretion of the trial court, whose action is not reviewable unless gross abuse is shown. Denial of continuance is not a palpable abuse of discretion in the absence of a showing as to what the witness would testify. *Brand v. State*, 13 Ala. App. 390, 69 So. 379; *Hudson v. State*, 217 Ala. 479, 116 So. 800. No showing as to what the absent witnesses would swear was introduced in support of the motion. We find no abuse of discretion.

Counsel argues in brief that defendant was deprived of his constitutional right to compulsory process for the attendance of witnesses. It was shown that ordinary compulsory process of subpoena had been issued for these witnesses, but that Knight was not found, and at the time of trial Mrs. Wilson was in Florida.

In *Childress v. State*, 86 Ala. 77, the court said:

> "Extraordinary compulsory process, such as attachment, is not resorted to, until the witness has placed himself in contempt, and the propriety and the necessity of the process is shown. The court is not bound to order an attachment, ex mero motu, on the failure of a witness to appear in answer to the subpoena. It is not shown that the defendant asked for an attachment, or other compulsory process."

It is not shown that the defendant asked for an attachment or that the witnesses were within the jurisdiction of the court. *Forrester v. State*, 41 Ala. App. 654, 148 So. 2d 251; *Jarvis v. State*, 220 Ala. 501, 126 So. 127. See also *Powell v. State*, 39 Ala. App. 246, 100 So. 2d 38, cert. den. 267 Ala. 100, 100 So. 2d 46.

After the state had rested its case in chief and during the examination of defendant's witnesses he sought to introduce magnetic tape recordings of statements allegedly made by Ida Bell Wilson and written statements of absent witnesses Ida Bell Wilson and William K. Knight. The tapes were offered "for the purpose of impeaching the witnesses Kean and Mrs. West and Mr. West and Shirley." The State's objection to the introduction of these statements was sustained.

Our statute, Title 15, §§ 297, 298, Code 1940, provides that a defendant in a criminal case may take the deposition of any witness who is unavailable to testify for any of the reasons set out therein. Also, it is an established rule that the testimony of a witness on a former trial may be introduced on a subsequent trial where the witness is inaccessible, provided certain conditions are found to exist and the fundamental requirements for the admission of such testimony are met. *Welldon v. Roberts*, 37 Ala. App. 1, 67 So. 2d 69, affirmed, 259 Ala. 517, 67 So. 2d 75; 31 A. C.J.S. Evidence, Chapter 1X, ps. 944, 978.

There was no contention that the tapes and statements came within the requirements of the rule. No foundation or predicate was laid to assure the authenticity of the offered exhibits. They were inadmissible as hearsay and the court properly excluded them.

Officer David Kean testified that around 1:30 the night of the robbery he and officer Shirley stopped the West automobile, driven by the defendant, in front of Rupil's restaurant; that they were in front of the restaurant for fifteen or twenty minutes during which time they searched the two men in the car. He described the clothes worn by the men and the physical appearance of Mr. Sparks, his weight, color of his eyes and hair. He was then shown photographs of the area where the car was stopped. The State's objection to the admission of defendant's Exhibit 7, a night photograph of the location, was sustained. The witness stated the photograph did not correctly depict the lighting conditions as they appeared at the time of the arrest. The photograph was properly excluded. *Vandiver v. State* 37 Ala. App. 526, 73 So. 2d 566; *Henry v.*

State, 277 Ala. 247, 168 So. 2d 617.

The record discloses the jury retired to consider its verdict at 1:40 p.m., on Friday, August 30th. At 5:30 they were brought before the court and sent to supper. After supper they deliberated until 8:00 o'clock when they were sent to their rooms for the night.

The judge who tried the case resided in another county in the circuit. On Saturday morning the jury returned to the courtroom and reported they could not reach a verdict. A circuit judge residing in the county of trial, who evidently had agreed to accept the verdict, charged the jury as to its duty to reach a verdict, if possible, and sent the jury to its room for further deliberation. No exception was reserved to the court's instruction and nothing is presented for our review.

One of the grounds of motion for a new trial was that the defendant was denied a fair and impartial trial, for that the jury "sought to leave the jury room and report to the court at 9:45 o'clock A.M., on the 31st day of August, 1968, but was denied by the bailiff of said court, and informed that a judge was not available for them to report to, and that the jury was refused every attempt to return without unanimous agreement of conviction, and on a weekend when one or more of the jurors had a pressing engagement."

Mr. Stowe, a juror, testified at the hearing on the motion for new trial that on Saturday morning he knocked on the jury room door and informed the bailiff the jury could not agree. The bailiff told him the "Judge said try it a little longer." He stated on cross examination that the fact that he had planned a trip for the week-end did not influence his verdict.

Juror Caldwell stated he did not recall that the bailiff refused to let the jury come out or that he told them to deliberate longer.

Mrs. Inez Robertson, a juror, testified she remembered the occasion on Saturday morning when the bailiff told the jury to deliberate a little longer.

Mr. Ballenger, a juror, testified the verdict was returned about 2:00 p.m. At about 9:45 a.m. the jury attempted to inform the court they were deadlocked, but the bailiff told them the judge said for them to go back and deliberate further.

Mr. Walter Lybrand, called as a witness by the defendant, testified he served as bailiff in this case. He remembered that on Saturday morning one of the jurors wanted to talk to the judge. He did not remember telling the jury the judge said to go back and deliberate further. "I told them they would have to come in before the Judge." In reply to the question by defense attorney the witness stated he did not telephone the judge to find out what time he was coming or to tell him the jury "wanted to come out." The inference to be drawn from this testimony is that the judge had not reached the courthouse when the jury made its request, and there was not an arbitrary refusal of such request by the bailiff. We are of opinion the court did not err in denying defendant's motion for a new trail on the ground of the alleged misconduct of the bailiff.

The judgment is due to be and hereby is affirmed.

AFFIRMED.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEAL

OCTOBER TERM, 1969-70

7 Div. 9

Donald Sparks

v.

State

Appeal from DeKalb Circuit Court

(JUDGMENT)

September 15, 1970

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this court and of the Circuit Court.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1970-71

7 Div. 9

Donald Sparks

v.

State

Appeal from DeKalb Circuit Court

November 17, 1970

Judgment of affirmance having been rendered on September 15, 1970, and timely application for rehearing having been filed by appellant on September 29, 1970, it is the order and judgment of this court that the application for rehearing be and the same is hereby overruled.

THE SUPREME COURT OF ALABAMA

THURSDAY, DECEMBER 17, 1970

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN, HARWOOD, BLOODWORTH, MADDOX and McCALL

CHIEF JUSTICE LIVINGSTON, NOT SITTING

7th Div. 889

Ex parte: Donald Sparks, Petitioner
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Donald Sparks v. State of Alabama)

(DeKalb Circuit Court)

Comes the petitioner, and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted on briefs and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the Writ be, and the same is hereby, denied and that the Petition be, and the same is hereby, dismissed at the costs of the petitioner, for which costs let execution issue.

(No Opinion)

(Simpson, Coleman, Bloodworth, Maddox and McCall, JJ., concur.)